No. 84483-6

SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, a municipal corporation,

Petitioner,

v.

ROBERT M. MCKENNA, Attorney General, State of Washington,

Respondent.

PETITIONER'S RESPONSIVE MEMORANDUM

PETER S. HOLMES, WSBA #15787
Seattle City Attorney

LAURA WISHIK, WSBA #16682
Assistant City Attorney

Seattle City Attorney's Office
600 – 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

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I. SUMMARY OF THE ARGUMENTS

Respondent argues three grounds for dismissal of the Petition: 1) The Attorney General has authority to make the State a plaintiff in the Florida case,[1] and the exercise of that authority is discretionary; 2) the Petition is actually a suit for a declaratory judgment and fails to meet the justiciability criteria for such a claim; and 3) the City lacks standing to assert the Governor's interests. Petitioner responds: 1) The Attorney General exceeded his statutory authority and has no discretion to do so; 2) the City is not seeking a declaratory judgment; and 3) the City has standing on its own behalf and in a representative capacity on behalf of its residents to stop a public officer from exceeding his authority.

II. FACTS

The key facts are undisputed. Respondent joined the State of Washington as a plaintiff in a federal case challenging the Patient Protection and Affordable Care Act ("the Florida case"). He purports to represent the State of Washington in its sovereign capacity. He did not consult with the Governor before making Washington a plaintiff and, when she objected, he refused to withdraw the State from the case.

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[1] *State of Florida, et al. v. United States. Dept. of Health and Human Services, et al.*, Case No.: 3:10-cv-91-RV/EMT (N.D.Fla.)

Plaintiffs in the Florida case were granted permission to file an Amended Complaint. Washington's Governor expressly asked the Attorney General to alter his role when the Amended Complaint was filed, from representing the "State of Washington, by and through Attorney General Robert M. McKenna" to participating as "Robert M. McKenna Attorney General for the State of Washington." Wishik Declaration, Ex. F (May 7, 2010 letter from Governor Gregoire to Attorney General McKenna). Respondent refused and proposed instead that the Governor appear on the opposing side as the "State of Washington, by and through Governor Christine O. Gregoire." Wishik Decl., Ex. G (May 12, 2010 letter from McKenna to Gregoire). In other words, Respondent proposes that the State of Washington be both plaintiff and intervenor-defendant.

III. ARGUMENT

A. The Court should exercise its original jurisdiction.

This Court has original jurisdiction in mandamus as to all State officers. Const. art. IV, §4. There are three reasons for the Court to exercise its original jurisdiction in this case: 1) It is the Supreme Court's role to resolve issues of constitutional and statutory construction; 2) the Supreme Court is the only tribunal that can correct a mistake in its prior decisions; and 3) a significant public interest is involved.

The Supreme Court's role is to resolve issues requiring construction of the State Constitution and statutes. *State ex. rel. Hartley v. Clausen,* 146 Wash. 588, 592, 264 P. 403 (1928). Once the Court has done so, its interpretation is binding on lower courts until overruled. *State v. Gore,* 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Here, the Court should exercise its original jurisdiction to correct prior decisions that relied upon an incorrect version of RCW 43.10.030(1). See discussion *infra* at 11-13. The Court has a duty to reexamine the meaning of a statute when its prior decisions were "incorrect, through a mistaken conception of the statute or rule." *In re Yand's Estate,* 23 Wn.2d 831, 837, 162 P.2d 434 (1945). The scope of the Attorney General's authority should not be defined by a typing error.

In addition, the Court will exercise its jurisdiction when a significant public interest is involved. *Washington State Labor Council v. Reed,* 149 Wn.2d 48, 54, 65 P.3d 1203 (2003); *Heavey v. Murphy,* 138 Wn.2d 800, 804, 982 P.2d 611 (1999); *City of Tacoma v. O'Brien,* 85 Wn.2d 266, 268, 534 P.2d 114 (1975). The public has a significant interest in knowing: What are the limits of the Attorney General's authority in this state?[2] Is the

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[2] The scope of a state attorney general's authority varies depending on the wording in state constitutions and statutes. *E.g., Hancock v. Terry Elkhorn Mining Co.,* 503 S.W.2d 710, 715 (Ky. 1973) (attorney general, " shall exercise all common law duties and authority . . . under the common law, except when modified by statutory enactment"); *Humphrey v. McLaren,* 402 N.W. 2d 535, 543 (Minn. 1987) (constitution lacks limiting language "prescribed by law").

Attorney General authorized to unilaterally make the State a plaintiff in a federal case, without any agency or officer as a client, over objections by the Governor?

B. Mandamus is appropriate to compel a State officer to undo an unauthorized act.

The Petition seeks a writ to compel Respondent to withdraw the State of Washington from the Florida case, because he exceeded his authority in making the State a plaintiff in the first place. Mandamus may be used to stop a public officer from acting outside his authority and to compel him to undo unauthorized acts. *State ex rel. Burlington Northern v. Washington State Utilities & Transportation Comm'n ("WUTC"),* 93 Wn.2d 398, 609 P.2d 1375 (1980); *City of Tacoma,* 85 Wn.2d at 268, (citing, *State ex rel. O'Connell v. Yelle,* 51 Wn.2d 620, 320 P.2d 1086 (1958)).

Respondent argues that mandamus is only appropriate when a statute explicitly requires the act that the petitioner seeks to compel or prohibit. Resp't Mem. at 4-5. Not so. In *Burlington Northern*, the Court issued a writ of mandamus to compel the WUTC to stop using regulatory fees to pay legal expenses and to reimburse fees already expended. *See* 93 Wn.2d at 410. No statute expressly barred the disputed use of fees, and no statute directed the WUTC to reimburse fees improperly spent. The

Supreme Court considered case law to determine whether the WUTC had authority to use fees for legal expenses. Since the Court concluded that the WUTC had exceeded its authority, mandamus was issued to require the unauthorized act to be undone.

Likewise, Respondent lacks authority and therefore lacks discretion to make the State a plaintiff in the Florida case. Mandamus is appropriate to compel him to undo the unauthorized act by withdrawing the State from the case.

C. The Attorney General has only the authority granted by statute.

Respondent assumes that the fact he is "independently elected" somehow clothes him with extrastatutory authority. Resp't. Mem. at 5. The history and provisions regarding the role of the Attorney General in this state demonstrate otherwise. The Constitution provides as follows:

> The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.

Const. art. III, § 21 (emphasis added). Use of the phrase "prescribed by law" in the constitution means the officer has only the powers expressly granted by the state legislature. *Yelle v. Bishop,* 55 Wn.2d 286, 295-96, 347 P.2d 1081 (1959) (State Auditor has no common-law powers); *State ex rel. Winston v. Seattle Gas & Electric Co.,* 28 Wash. 488, 497, 68 P. 946 (1902).

In *Seattle Gas & Electric*, the Attorney General brought a *quo warranto* proceeding alleging the Seattle Gas & Electric Company was using city streets without authorization. 28 Wash. at 490. The defendant argued that only the prosecuting attorney had statutory authority to bring such an action. The Court agreed, explaining:

> Political power in this state inheres in the people, and by constitutional or statutory authority the exercise of this power in behalf of the people is delegated to certain officers. In the exercise of power the officer is controlled by the law theretofore declared.

Id. at 495-96. After reviewing the statutory grants of authority to the Attorney General, the Court held, "Nowhere is there any express provision of the law authorizing the attorney general to institute the suit in question." *Id.* at 499. The Court explained:

> The legislation of the state shows that the legislature has not considered that the attorney general is clothed with any other power than that conferred upon him by the constitution or by express legislative enactment. Where it has been deemed necessary for the attorney general to appear and represent the state, authority for that purpose has been given to him by express enactment.

Id. at 501-02 (emphasis added). Similarly, in this case no statute expressly authorizes the Attorney General's actions.

The principle statute granting the Attorney General authority is RCW 43.10.030 (copy attached). Only subsection (3) mentions the federal courts and it only authorizes the Attorney General to defend state officers, not make

the State a plaintiff. Under the rule of *expressio unius est exclusio alterius*, the Legislature's inclusion of the federal courts in one section means the other sections authorize the Attorney General to act only in state courts. *Landmark Development v. City of Roy,* 138 Wn.2d 561, 572-73, 980 P.2d 1234 (1999).

Respondent, however, argues that the first subsection of RCW 43.10.030, combined with RCW 43.10.040, grants the Attorney General broad authority to act whenever he deems it to be in the state's interest. Resp't Mem.at 5-6. RCW 43.10.030(1) authorizes the Attorney General to "appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested." This grant of authority is limited to (state) appellate courts.

RCW 43.10.040 provides:

> The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

This might superficially appear to grant broad authority; however, in construing a statute the court does not read the words in isolation, but also considers related provisions to determine the "plain meaning." *Dept. of*

Ecology v. Campbell & Gwinn, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). The language now codified as RCW 43.10.040 was enacted in 1941 as the first section of a chapter with several related sections. Laws of 1941, ch. 50 (copy attached). The second section barred state agencies and officers from hiring their own legal counsel. *Id.* The third section authorized the Attorney General to employ experts to assist with litigation. *Id.* Together, these provisions addressed who would represent state agencies and officers.

In *State v. Herrmann*, the Court explained as follows:

> It is clear that the purpose of Laws of 1941, chapter 50 was to end the proliferation of attorneys hired by various state agencies and place the authority for representation of state agencies in the Attorney General.

89 Wn.2d 349, 354, 572 P.2d 713 (1977). In restricting state agencies and officers to getting legal representation from the Attorney General's Office, the Legislature did not grant the Attorney General broad authority to unilaterally initiate lawsuits whenever he deems the state's interest to be implicated.

Further, construing RCW 43.10.040 as a broad grant of authority renders obsolete many other statutes that grant the Attorney General authority to act in specific circumstances. *E.g.,* RCW 42.17.400 (Attorney General may bring civil action to enforce state campaign financing law);

RCW 42.52.490 (upon a written determination by the Attorney General that the action of an ethics board was clearly erroneous or if requested by an ethics board, the Attorney General may bring a civil action to enforce the state ethics code); RCW 19.86.080 (Attorney General may enforce the consumer protection statute).

"Whenever possible, courts should avoid a statutory construction which nullifies, voids, or renders meaningless or superfluous any section or words." *Nisqually Delta Assoc. v. City of DuPont,* 95 Wn.2d 563, 568, 627 P.2d 956, (1981); *see also Taylor v. Redmond,* 89 Wn.2d 315, 319, 571 P.2d 1388 (1977). Since construing RCW 43.10.040 as a broad grant of authority would render numerous statutes superfluous, that construction cannot be correct. The Legislature intended RCW 43.10.040 to limit who would provide legal services to state agencies and officers, nothing more.

D. Case law does not support expansive authority.

Respondent argues that this Court's decisions describe the Attorney General's authority so expansively they encompass his actions in this case. Resp't Mem.at 6-10. Respondent reads the cases too broadly.

In the companion cases of *Berg v. Gorton* and *Boe v. Gorton*, the question presented was whether the Attorney General "had an absolute duty" to recover funds expended under a program later determined to be unconstitutional. 88 Wn.2d 756, 769, 567 P.2d 187 (1977); 88 Wn.2d

773, 775, 567 P.2d 197 (1977). In *Berg* the plaintiffs sued the Attorney General for monetary damages and in *Boe* the plaintiff sought a writ of mandamus. There was no dispute over whether the Attorney General had statutory authority to recover the funds. The issue was whether he must do so. Not surprisingly, the Supreme Court held that the Attorney General has discretion over when to exercise authority expressly granted to him by statute. In this case, the Attorney General does not have statutory authority to unilaterally make the State a plaintiff in the Florida case. *Boe* and *Berg* are therefore inapposite.

The same is true of *Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994). Petitioners in that case sought a writ of mandamus directing several State officers (including the Attorney General) "to adhere to the requirements of the Washington State Constitution and to prohibit them from implementing and enforcing Initiative 601." *Id. at* 407. The Court declined to issue a writ compelling a general course of conduct which would include discretionary actions. The Petition in this case is not directed at a general course of conduct. It seeks to compel Respondent to undo an unauthorized action that Respondent did not have discretion: to take.

Berg, Boe, and *Walker* stand for the unremarkable principle that when the Attorney General has been expressly granted authority by

statute, he then has discretion over how and when to exercise it. The question in this case is whether the Attorney General has been granted authority to take the challenged actions. These questions are fundamentally different.

Respondent's best support is set forth in *Young Americans for Freedom v. Gorton,* 91 Wn.2d 204, 588 P.2d 195 (1978). The Court should review that decision cautiously, however, due to an error in a prior guiding decision and circumstances which differ dramatically from this case.

In *Young Americans,* the Attorney General filed an amicus brief in the *Bakke* case, then pending in the United States Supreme Court. The brief was filed "to preserve the right of the University [of Washington] to serve the interests of all of its students in education for life and careers in a pluralistic, multi-racial society . . ." Brief of Amicus Curiae State of Washington (1977 WL 189504) at 2, *Regents of the Univ. of Cal. v. Bakke,* 98 S. Ct. 2733 (1977) (excerpt attached). Plaintiffs sued the Attorney General and an assistant attorney general individually, seeking damages for "abridgment of their constitutional rights." 91 Wn.2d at 206. The Court affirmed dismissal of their claim, saying:

> In *Taylor* we held that RCW 43.10.030(1), as it then read, [FN5] authorized the Attorney General to enforce charitable trusts by way of an accounting action, although the statutes did not embody a clear command to the Attorney General to do so. We reasoned that "inasmuch as

> the proper management of charitable trusts is a matter of public concern, this is a case in which the state is interested."

Id. at 209 (citing *State v. Taylor*, 58 Wn.2d 252, 255, 362 P.2d 247 (1962)). In the footnote to the statement above, the *Young Americans* court quoted the statute that it apparently thought the *Taylor* court had relied upon:

> FN5. "The attorney general shall:
>
> "(1) Appear for and represent the state before the supreme court in all cases in which the state is interested; . . ." RCW 43.10.030(1).

(emphasis added). That was the correct wording of the statute at the time of the *Taylor* decision, but the *Taylor* court had relied upon an erroneous version of the statute, which it quoted in its decision:

> In RCW 43.10.030, the legislature has provided that 'The attorney general shall:
>
> '(1) Appear for and represent the state before the courts in all cases in which the state is interested;

58 Wn.2d at 256 (emphasis added).

The error arose as follows. Before Washington became a state, the statute provided the Attorney General with authority to "appear for and represent the people of the Territory before the supreme court in all cases in which the Territory or the people of the Territory are interested." Territorial Laws, chapter VII, Section 6, 1st paragraph (1888) (emphasis

added). The same wording was used in early codifications of Washington laws. Rem. Rev. Statutes, ch. 9, §112(1) (1932) (copy attached).

A new codification, which renumbered and rearranged the statutes, was prepared in 1949. RCW Vol. 1 (1949) (copy attached). In the process, the reference to the supreme court was deleted. *Id. at* 43-21. The erroneous publication stated the Attorney General was authorized to "appear for and represent the state before the courts in all cases in which the state is interested." (emphasis added). In 1965 -- 3 years after the *Taylor* decision -- the error was corrected, and the limiting reference to the "supreme court" was reinserted. Laws of 1965 (notes for changes to 43.10.030(1): "'courts' to 'supreme court' in subdivision 1 to restore session law language.") (emphasis added).

The erroneous wording was central, however, to the Court's decision in *Taylor*. 58 Wn.2d at 255. The question in that case was whether the Attorney General had authority to enforce charitable trusts. Such authority was not expressly granted in any statute. The Court stated as follows:

> In RCW 43.10.030, the legislature has provided that,
> 'The attorney general shall: (1) Appear for and represent the state before the courts in all cases in which the state is interested.'
>
> The foregoing authority certainly does not embody a clear command to the Attorney General to enforce charitable

> trusts. However, we are convinced that, inasmuch as the proper management of charitable trusts is a matter of public concern, this is a case in which the state is interested.

Id. at 256 (emphasis added). The decision in *Taylor* was based upon an erroneous version of the statute, therefore it is not reliable authority.[3] *Young Americans* is suspect also to the extent it relied on *Taylor*.

Following establishment of the Washington Court of Appeals in 1969, many statutes, including RCW 43.10.030(1), were amended to add references to the court of appeals. The revised statute authorized the Attorney General to "[a]ppear for and represent the state before the supreme court and court of appeals in all cases in which the state is interested." Laws of 1971 at 250 (emphasis added) (copy attached). Notably, the amended statute still did not authorize the Attorney General to appear in trial courts.

In addition, the circumstances in *Young Americans* differ significantly from the present case. In *Young Americans*, the attorney general had a client, the University of Washington, and was acting on its behalf. He has no agency or officer as a client in the Florida case.

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[3] Further, statutes granting such authority were enacted later, which is inconsistent with the idea that the attorney general had implied authority in their absence. RCW 11.110.100 (1967).

In *Young Americans*, the Attorney General was defending the policy choice made by the executive branch that consideration of race in admissions to graduate programs was appropriate. In this case, the Attorney General is opposing the policy choice made by the executive branch.

In *Young Americans*, the Attorney General filed an amicus brief, which carries far different legal ramifications than making the State a plaintiff. Whatever a court ultimately decides has no direct effect on a party filing an amicus brief. When the State is a plaintiff the court's rulings are binding on it and the doctrines of judicial estoppel, res judicata, and collateral estoppel may bar the State from taking a different position in another case.

Another distinction between *Young Americans* and this case is that the plaintiffs in *Young Americans* were seeking monetary damages from the Attorney General and an assistant attorney general in their individual capacities. Petitioner in this case seeks a writ of mandamus to compel the Attorney General to cease acting outside his authority. The Court may well apply a different lens to considering whether the Attorney General has so exceeded his authority that he should face personal liability for violating the plaintiffs' civil rights, especially when the allegedly unauthorized action was the filing of an amicus brief on behalf of his client.

The remaining cases cited by Respondent are readily distinguished. In *State v. Asotin County,* 79 Wash. 634, 638, 140 P.2d 914 (1914), the legislature had enacted a law requiring counties to pay the state for horticultural inspections. The statute also instructed the Attorney General to sue any county that failed to pay, which he did. *Id.* The County argued the case should be dismissed on the ground that the statute did not say suits could be brought in the name of the State. The Court disagreed, saying:

> When the Legislature directed [the attorney general] to bring an action . . . it was certainly contemplated that such action would be instituted in the name of the state, whose representative and counselor the Attorney General is.

*Id.*at 638. There is no similarity whatsoever between the issue in the *Asotin County* case and this one. In *Asotin County* the legislature had not only authorized the Attorney General to act, it had directed him to act in precisely the manner he did. In this case there is no statute directing or authorizing the action taken by Respondent.

Respondent further relies upon dicta in a federal case that inaccurately describes Washington law. Resp't Mem. at 7-8, citing *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 747 F.2d 1303 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 2323. In that case, the state, represented by Attorney General Eikenberry, brought an antitrust action against several oil companies. When the trial court held him

in contempt for discovery violations, he sought an interlocutory appeal on the ground that he was not a party to the case. The Ninth Circuit held there was a "congruence of interests" between Eikenberry and the state, therefore appeal of the discovery order could not be severed from the primary action. The court found it significant that the state, not Eikenberry, would pay the sanctions and that he faced no personal risk. *Id.* at 1306.

Respondent quotes a part of the opinion that says the Attorney General is, "the state official in charge of initiating and conducting the course of litigation. The determination whether to bring an action rests within the sole discretion of the Attorney General." *Id.* However, the Ninth Circuit was not determining whether Eikenberry had authority to initiate the case, but rather whether, having done so, he should be granted an interlocutory appeal.

E. The Attorney General cannot act unilaterally.

Respondent cites *State ex rel. Hartley v. Clause, 146 Wash. 588, 264 P. 403 (1928)* as having "upheld the authority of the Attorney General to maintain an action upon his own initiative" and as recognizing "that the Attorney General could decline to follow the preference of the Governor[4]."

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[4] Respondent goes so far as to mischaracterize *Hartley* as authority that the Attorney General need not withdraw from a case when the Governor disagrees with his position. Resp't Mem. at 17-18. In *Hartley* the issue was whether there would be a case, not whether the Attorney General would be in it.

Resp't Mem. at 18. Nothing in the opinion indicates those issues were before the court.

In *Hartley*, the Governor asked the Attorney General to bring suit to determine whether it was legal for the State Auditor and Treasurer, as members of the state highway committee, to employ a secretary and consulting engineer. When the Attorney General declined, the Governor sued them himself. The State Auditor and Treasurer moved to dismiss the complaint, contending the Governor did not have authority to bring it.

There was no question that the Attorney General had statutory authority to bring the suit. The question was whether the Attorney General was the only party that could bring it. 146 Wash. at 589. The Court noted that the constitution designates the Governor the "supreme executive officer" and makes the Governor responsible for seeing that "the laws are faithfully executed." Id. at 592 (quoting) Const. art. III, §1. The phrase "supreme executive authority" means "'the highest executive authority in the state, all other powers being inferior thereto.'" *Id.* The Court ruled, therefore, that the Governor could bring the suit if the Attorney General refused:

> As the final right to determine the true intent and purpose of all laws is lodged in the Supreme Court of this state, so is the final determination as to their enforcement and execution lodged in the Governor.

Id. at 592. The opinion is silent on the question of whether the Attorney General must sue if the Governor directed him to do so, because that was not the relief the Governor sought. *Hartley* does not stand for the propositions Respondent attributes to it.

Respondent also reads too much into other cases. Resp't Mem. at 18–19, (citing *State v. Gattavara,* 182 Wash. 325, 47 P.2d 18 (1935); *State ex rel. Dunbar v. Board of Equalization,* 140 Wash. 433, 249 P.2d 996 (1926); *Reiter v. Wallgren,* 28 Wn.2d 872, 184 P.2d 571 (1947)). In *Gattavara*, the Department of Labor and Industries filed suit, using in-house attorneys, to collect delinquent insurance premiums and penalties. The defendants moved to dismiss, contending the action could only be brought by the Attorney General or someone else with express statutory authority. *Id. at* 327. The trial court denied the motion, but the Supreme Court reversed, concluding the Department of Labor & Industries lacked statutory authority to initiate lawsuits. *Id. at* 328.

The Court noted the Constitution says the Attorney General, "shall be the legal adviser of State officers, and shall perform such other duties as may be prescribed by law." The Court then said:

> Although the constitutional provision above quoted is not self-executing, when the duties of the Attorney General are prescribed by statute and the statute has for its purpose the authorization of proper state officers to bring actions, that authority is exclusive. As such officer, the Attorney General

> might, in the absence of express legislative restriction to the contrary, exercise all such power and authority as the public interest may, from time to time, require.

Id. at 329 (emphasis added). In other words, when a statute expressly grants the Attorney General and no one else authority to bring an action, then the Attorney General's authority is exclusive. That holding has no bearing on the present case, because no statute grants the Attorney General authority to act in the manner challenged here.

In *Dunbar*, the Court held that the statute authorizing the Attorney General to "[i]nstitute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer," authorized the Attorney General to prosecute State officers when they violate the law. 140 Wash. at 439-440. This construction of a particular statutory provision in a particular context, does not mean the Attorney General has expansive authority to act unilaterally for the State. The same is true of *Reiter*, in which the issue before the Court was whether a taxpayer could sue, not the scope of the Attorney General's authority. 28 Wn.2d at 881.

This case demonstrates why the Attorney General does not have authority to unilaterally make the State a plaintiff in a federal case. Respondent has suggested to the Governor that both of them could represent the State, on opposite sides of the case, ignoring, for instance, the uncertain

effect of rulings in a case in which a party is on both sides.[5] Discovery disputes are likely to arise, with the same party both issuing and answering opposing interrogatories, both taking and defending depositions, and so on. There may not be any discovery in the Florida case, but the plaintiffs have alleged ten pages of facts. Resp't Mem., Ex. A (amended complaint), p.9-20. If the Governor brings the State into the case on the defense side, the State could be contesting facts it has also averred. Washington's founders surely did not intend the State to be divided against itself in this way.

F. Justiciability is not a basis for dismissal.

Respondent attempts to restyle the Petition as a suit for a declaratory judgment and then argues the City has not met the justiciability requirements for such a claim. Resp't Mem. at 10. The City is not seeking a declaratory judgment, therefore this entire section of Respondent's brief (pp 10–14) is irrelevant. Nonetheless, were the justiciability criteria applicable, the Petition would meet them because Petitioner has an interest in not having state officers exceed their authority, the dispute became actual and present when Respondent brought the State into the Florida case, and the Court can conclusively resolve the dispute by issuing the requested writ. Further, the Court exercises its discretion to resolve issues, even when the justiciability

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[5] State agencies or officers with opposing interests are sometimes plaintiff and defendant, but here the exact same entity – the sovereign State – would be on both sides.

test is not met, if doing so would guide public officers in the future or be beneficial to the public or other branches of government. *Snohomish County v. Anderson,* 124 Wn.2d 834, 841, 881 P.2d 240 (1994).

G. The City has standing to seek a writ to compel a State officer to stop exceeding his authority.

Respondent argues that Petitioner is asserting an interest that belongs solely to the Governor and lacks standing to do so. Resp't Mem. at 15. Petitioner is asserting an interest in having public officers abide by the constitution and statutes. The City has standing to protect this interest on its own behalf and in a representative capacity on behalf of its residents. *City of Seattle v. State,* 103 Wn.2d 663, 646, 694 P.2d 641 (1985) (city may assert an equal protection violation on behalf of people who might become city residents if annexation occurred).

In the *City of Tacoma* case, the plaintiffs were two cities, a county, and a taxpayer. They sought a writ of mandamus to prohibit the State Treasurer from disbursing funds under a statute they claimed was unconstitutional. 85 Wn.2d at 268. Respondent moved to dismiss the petition for lack of standing. The Supreme Court held there was no reason to apply a different standard for standing to the governmental entities as to the taxpayer. None of them had to allege a direct, special or pecuniary interest in the outcome of the action. *Id. at* 269 (citations omitted). Like the *City of*

Tacoma case, Petitioner in this case is challenging the act of a public official. Its allegations are, therefore, sufficient to establish standing.

Usually, before bringing suit, a taxpayer must ask the Attorney General to sue the public official whose actions are at issue. *Reiter v. Walgren,* 28 Wn.2d 872, 876-77, 184 P.2d 571 (1947). This step is not required when such a demand would have been useless. *Id. at* 877. Here, Respondent refused to withdraw from the Florida case when the Governor asked him to do so. It would have been useless for the City to make the same request and it would be absurd to ask the Attorney General to seek a writ against himself.

This Court also has recognized standing in a variety of situations that raise issues of broad public importance, without requiring plaintiffs to have a direct or pecuniary interest. *State ex rel. Boyles v. Whatcom County Superior Court,* 103 Wn.2d 610, 612, 694 P.2d 27 (1985) (taxpayer could challenge constitutionality of a work release program); *Washington Natural Gas Co. v. PUD No. 1 of Snohomish County,* 77 Wn.2d 94, 96, 459 P.2d 633 (1969) (controversy "affects substantial segments of the population"); *Ordell v. Gaddis,* 99 Wn.2d 409, 662 P.2d 49 (1983) (plaintiffs raised issues of "serious public importance").

The Attorney General previously endorsed use of a writ of mandamus by a private citizen to compel a public officer to act within his

statutory authority. Wash. AGO 1953-55 No. 94 (copy attached). The State Treasurer had refused to confiscate personal property for nonpayment of personal property taxes and instead charged the unpaid taxes against real property. The Attorney General concluded the Treasurer did not have authority to choose which remedy to use. Petitioner concurs with the closing line of the Attorney General's Opinion, "The people whom we all serve have a right to good government. That right is never without a remedy." *Id. at* 5.

IV. CONCLUSION

Respondent stitches together dicta and quotes from inapposite cases to support the proposition that the Attorney General has unfettered discretion to being suit whenever he deems the State to be interested. When the cases and statutes are examined, it is clear the Attorney General does not have authority to act unilaterally and make the State of Washington a plaintiff in the Florida case. Respondent's motion to dismiss the Petition should, therefore, be denied and the Court should exercise its original jurisdiction.

RESPECTFULLY SUBMITTED this 15th day of June, 2010.

Peter S. Holmes
Seattle City Attorney

By: Laura Wishik for
Peter S. Holmes, WSBA #15787
Seattle City Attorney

Laura Wishik
Laura Wishik, WSBA #16682
Seattle City Attorney's Office
600 – 4th Ave., 4th Floor
PO Box 94769
Seattle, WA 98124-4769
(206)684-8200
Attorneys for Petitioner

No. 84483-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE CITY OF SEATTLE, a municipal corporation,	)
Petitioner,	) DECLARATION OF AUTHENTICITY OF EXHIBITS
v.	)
ROBERT M. MCKENNA, Attorney General, Washington State,	)
Respondent.	)

1. I am an Assistant City Attorney for the City of Seattle, and represent the Petitioner in this matter.

2. The documents attached as exhibits are true and correct copies of the originals. They are:

   Exhibit F - May 7, 2010, letter from Governor Gregoire to Attorney General Rob McKenna.

   Exhibit G - May 12, 2010, letter from Rob McKenna to Governor Gregoire.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and of my own knowledge, and that I executed this declaration at Seattle, Washington, in the County of King, this 14th day of June, 2010.

Laura Wishik

Laura Wishik

CHRISTINE O. GREGOIRE
Governor

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6780 • www.governor.wa.gov

May 7, 2010

The Honorable Rob McKenna
Attorney General
Post Office Box 40100
Olympia, WA 98504-0100

Dear Attorney General McKenna:

I understand that you will file an amended complaint on May 14, 2010, in *State of Florida, et al. v. United States Department of Health and Human Services, et al.* When that amended complaint is filed, I request that you list the plaintiff as "Robert M. McKenna, Attorney General of The State of Washington," and not as "The State of Washington."

It is your choice whether to participate in this lawsuit in your capacity as the Attorney General. However, stating that you represent the interests of the "State of Washington" would not be appropriate when you have been informed that the Insurance Commissioner, the Speaker of the House, the Majority Leader of the Senate, and I in my official capacity as Governor of the state object to the action you have filed. Continuing to list the plaintiff as the "State of Washington" in an amended complaint is not an accurate representation to the court or the public.

In this case, the court will be asked to hear the positions of two Washington constitutional officers with opposite views on important issues. The Washington Supreme Court has noted the relationship of the Attorney General and the Governor in our constitutional structure:

> Under the provisions of our Constitution it will be noticed that the executive department consists, among others, of the Attorney General. While in many of the Constitutions of the various states the Governor is but a part of the executive department, in the state of Washington, as is indicated by the above-quoted portions of our Constitution, the Governor is the supreme executive power. Black's Law Dictionary (7th Ed.) defines supreme power as 'the highest authority in the state, all other powers in it being inferior thereto.' Which, of course, when applied to the instant case, means that the Governor, under our Constitution, is the highest executive authority.

State ex rel Hartley, Governor v. Clausen, 146 Wash. 588, 592, 264 P. 403 (1928). We have examined the Washington constitution, case law and statutes and find nothing that would provide the Attorney General the authority to maintain an action of this nature in the name of the State of Washington over the objection of the Governor.

I ask that upon reflection and review of these legal authorities, or for reasons of comity, you will file the amended complaint as "Robert M. McKenna, Attorney General of The State of Washington." In turn, I would appear in the federal district court case as Christine O. Gregoire, Governor of the State of Washington. This will allow the court to hear two constitutional officers respectful of the authority of the other even though we hold different views.

Sincerely,

Christine O. Gregoire
Governor

Rob McKenna
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

May 12, 2010

The Honorable Christine Gregoire
Washington State Governor
PO Box 40002
Olympia, WA 98504-0002

Dear Governor Gregoire:

I am in receipt of your letter dated May 7, 2010. You request that in the matter of *State of Florida, et. al. v. United States Department of Health and Human services, et.al.*, I list the plaintiff as "Robert M. McKenna, Attorney General of the State of Washington." As presently drafted, however, the proposed caption will list the plaintiff State of Washington as "STATE OF WASHINGTON, by and through, ROBERT M. McKENNA, ATTORNEY GENERAL OF THE STATE OF WASHINGTON."

I have reviewed the case cited in your letter, *State ex. rel. Hartley, Governor v. Clausen*, 146 Wash. 588, 264 P. 403 (1928). While I readily acknowledge the case recognizes that the office of the Governor is the chief executive office of the State of Washington, I do not read it to lend support to your proposition that the caption "State of Washington" cannot be used over the objection of the Governor. I must decline your offer for three reasons.

First, as a means of identifying the parties in interest to this suit, the proposed caption puts the court on notice that this matter is being maintained by an independently elected constitutional officer in a *representational capacity*, rather than being maintained in an *individual* capacity by a state official. This legal distinction is an important one and I believe that your proposal would have the possibility of suggesting the latter.

Second, I note that in the proposed Amended Complaint, for states where the Attorney General is not appearing on behalf of the State (e.g. Georgia, Mississippi, Arizona, and Nevada), the caption denotes the State acting through its Governor as the party in interest. For example, Georgia will be listed as "STATE OF GEORGIA, by and through SONNY PERDUE, GOVERNOR OF THE STATE OF GEORGIA." Since you have stated it is your intent to file legal pleadings adverse to the legal arguments that will be advanced in this multi-state action, I believe this simple and consistent format will better serve the judge in determining who is

maintaining the suit and who is making what arguments, and will serve to avoid unnecessary confusion.

Third, you note that that you have examined Washington law and found nothing that would provide the Attorney General the authority to maintain an action in the name of the State of Washington over the objection of the Governor. However, my research has yielded nothing that would require the approval of the Governor before a pleading may bear the caption "STATE OF WASHINGTON". Moreover, I believe the fact that the Attorney General is a separately elected constitutional officer and statutorily may bring and maintain actions on behalf of the state confers this right, if not this obligation. *See generally,* Const. art. III, § 1, 21; RCW 43.10.030; .040.

Recognizing our differences in this matter, I committed to facilitate the appointment of a Special Assistant Attorney General to represent your interests as Governor. That has been accomplished through the appointments of SAAGs Gary Burns and Rebecca Roe. Similarly, I understand and appreciate your desire to distinguish your interests and arguments in this matter as Governor, from mine as Attorney General. In the interest of comity, I will continue to affix my signature to pleadings in this matter bearing the caption above. However, in this instance, I would also fully agree to your appearance in this matter as "STATE OF WASHINGTON, by and through CHRISTINE O. GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON." In this manner, we each should be able to accomplish our respective goals of protecting the interests of the State of Washington. Please call me with any further concerns.

Sincerely,

Rob McKenna

ROB MCKENNA
Attorney General

RMM/kw

OFFICE RECEPTIONIST, CLERK

To: CanonCopyA@seattle.gov; Worthy, Michele
Subject: RE: Declaration of Laura WISHIK

Rec. 6-14-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: CanonCopyA@seattle.gov [mailto:CanonCopyA@seattle.gov]
Sent: Monday, June 14, 2010 4:37 PM
To: Worthy, Michele
Subject: Declaration of Laura WISHIK

<< File: 4798_001.pdf >>

Appendix of Attachments to Petitioner's Responsive Memorandum City of Seattle v. Robert M. McKenna No. 84483-6

RCW 43.10.030
(current version)

oath of office as required by law; take, subscribe, and file with the secretary of state an oath to comply with the provisions of RCW 43.10.115; and execute and file with the secretary of state, a bond to the state, in the sum of five thousand dollars, with sureties to be approved by the governor, conditioned for the faithful performance of his or her duties and the paying over of all moneys, as provided by law.

[2009 c 549 § 5046, eff. July 26, 2009; 1973 c 43 § 1; 1965 c 8 § 43.10.010. Prior: 1929 c 92 § 1, part; RRS § 11030, part; prior: 1921 c 119 § 1; 1888 p 7 § 4.]

43.10.020. Additional bond—Penalty for failure to furnish

If the governor deems any bond filed by the attorney general insufficient, he or she may require an additional bond for any amount not exceeding five thousand dollars.

If any attorney general fails to give such additional bond as required by the governor within twenty days after notice in writing of such requirement, his or her office may be declared vacant by the governor and filled as provided by law.

[2009 c 549 § 5047, eff. July 26, 2009; 1965 c 8 § 43.10.020. Prior: (i) 1929 c 92 § 1, part; RRS § 11030, part. (ii) 1929 c 92 § 2; RRS § 11031; prior: 1921 c 119 § 1; 1888 p 7 §§ 4, 5.]

43.10.030. General powers and duties

The attorney general shall:

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

(3) Defend all actions and proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States;

(4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, he or she shall attend the trial of any person accused of a crime, and assist in the prosecution;

(5) Consult with and advise the governor, members of the legislature, and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers;

(6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;

(7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions;

(8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law;

(9) Keep in proper books a record of all cases prosecuted or defended by him or her, on behalf of the state or its officers, and of all proceedings had in relation thereto, and deliver the same to his or her successor in office;

(10) Keep books in which he or she shall record all the official opinions given by him or her during his or her term of office, and deliver the same to his or her successor in office;

(11) Pay into the state treasury all moneys received by him or her for the use of the state.

[2009 c 549 § 5048, eff. July 26, 2009; 1975 c 40 § 5; 1971 c 81 § 109; 1965 c 8 § 43.10.030. Prior: (i) 1929 c 92 § 3; RRS § 112. (ii) 1929 c 92 § 4; RRS § 11032; prior: 1891 c 55 § 2; 1888 p 8 § 6.]

Research References

ALR Library

137 ALR 818, Right of Attorney General to Represent or Serve Administrative Officer or Body to Exclusion of Attorney Employed by Such Officer or Body.

Treatises and Practice Aids

23 Wash. Prac. Series § 1.4, Legal Representation for Agencies.

Notes of Decisions

1. Construction and application

Statute requiring state Attorney General to defend all actions and proceedings against any state officer or employee acting in his official capacity in state and federal courts did not apply to requested representation of state Supreme Court justice in disciplinary proceeding before Commission on Judicial Conduct; proceeding did not occur in state or federal court. Sanders v. State (2009) 166 Wash.2d 164, 207 P.3d 1245. Attorney General ⇐ 6; Judges ⇐ 11(5.1)

20. Discretion

Under the Ethics in Public Service Act, Attorney General has discretion to decline to represent a judge, at public expense, in judicial disciplinary proceedings before the Commission on Judicial Conduct, subject to state's duty to reimburse the judge for defense costs if the Commission later dismisses the disciplinary charges or exonerates the judge of all violations of the Canons of Judicial Conduct. Sanders v. State (2007) 139 Wash. App. 200, 159 P.3d 479, affirmed 166 Wash.2d 164, 207 P.3d 1245. Attorney General ⇐ 6; Judges ⇐ 11(5.1)

43.10.040. Representation of boards, commissions and agencies

Laws of 1941, Ch. 50

Senate Bill No. 102

STATE OF WASHINGTON, TWENTY-SEVENTH REGULAR SESSION.

January 29, 1941, read first and second time, ordered printed and referred to Judiciary Committee.

AN ACT

Relating to the powers and duties of the attorney general; providing for the legal representation of the state of Washington and all departments, commissions, boards, agencies, and administrative tribunals thereof and providing for the appointment of certain personnel

SENATE COMMITTEE AMENDMENTS TO SENATE BILL NO. 102
(By a Majority of Judiciary Committee)

Amend the title, line 3 of the original bill, the same being line 2 of the title of the printed bill, by striking the word "all"

Amend the title, line 5 of the original bill, the same being line 4 of the printed bill, after the word "therein" and before the semi-colon (;) insert the following: ", excepting certain state agencies"

Amend Section 1, line 11 of the original bill, the same being Section 1, line 3 of the printed bill, by striking the word "or" and inserting in lieu thereof the word "and"

ADOPTED

Amend Section 1, line 21 of the original bill, the same being Section 1, line 11 of the printed bill, by inserting after the word "officials" and before the word "and" the following: ", boards, commissions"

Amend Section 1, line 29 of the original bill, the same being Section 1, line 17 of the printed bill, by striking the period (.) and inserting in lieu thereof the following: ", not exceeding the funds made available to the department by law for legal services."

Amend Sec. 2, page 1 of the original bill, the same being Sec. 2, page 1 of the printed bill, by striking the whole thereof and renumbering subsequent sections consecutively.

tain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties set forth in this act, except where it is provided by law to be the duty of the judge of any court or the prosecuting attorney of any county to employ or appoint such persons.

SEC. 4. The attorney general shall have the power to employ from time to time such skilled experts, scientists, technicians or other specially qualified persons as he may deem necessary to aid him in preparing for the trial of actions.

SEC. 5. All acts or parts of acts in conflict herewith are hereby repealed.

SEC. 6. If any section, clause, sentence or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, and the legislature hereby declares it would have enacted this act if such section, clause, sentence or phrase were omitted.

SEC. 7. This act is necessary for the immediate support of the state government and its existing public institutions, and shall take effect immediately.

Rem. Revised Statutes Ch. 9, §112(1)

REMINGTON'S
REVISED STATUTES
OF WASHINGTON
ANNOTATED

SHOWING ALL

STATUTES IN FORCE TO AND INCLUDING THE SESSION LAWS OF 1931

BY

HON. ARTHUR REMINGTON

Reporter of the Supreme Court of the State of Washington, Author of "Notes on Washington Reports," "Remington's Washington Digest," "Remington's Compiled Statutes of Washington," etc.

VOLUME II

CODES OF PROCEDURE

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1932

on account of death in his family, or of illness in his family of suc character that he is required to be in attendance thereupon, when his business interests would be seriously prejudiced by suc service. No person, however, shall be excused from service as juror on account of business reasons unless his service is such would lead to the waste or destruction of his property; and unle it shall appear that after having been summoned as a juror h had made every reasonable effort to permit of his serving as a jur without causing waste or destruction of his property. When e cused for any of the foregoing reasons, or for any reason deeme sufficient by the court, the name of the juror so excused sha remain upon the jury list from which jurors are drawn, and h name returned to the jury box from which it was drawn. A person applying to be excused from jury service for any of th causes herein specified, may be placed upon oath or affirmation testify truly in all respects as to the cause of such excuse, an that he will answer truly any question put to him by the judg with respect thereto. [L. '11, p. 317, § 7.]

§ 101. Separation of jury. In no action or proceeding wha ever, except felony cases shall the jury sworn to try the issu therein be kept together and in the custody of the officers of t court, save during the actual progress of the trial, until the ca shall have been finally submitted to them for their decision. Whe ever the jury are kept together in the custody of the officers wh the trial is not in progress, they shall be supplied with meals regular hours, and with comfortable sleeping and toilet accommod tions. [L. '11, p. 317, § 8. Cf. 1 Rem. & Bal. Code, § 346, repeale by this act.]

Separation of jury in criminal case. 34 A.L.R. 1115.

Separation of mixed jury of m and women. 71 A.L.R. 68.

§§ 102–111. Jurors—Qualifications—Exemptions—Drawings—Etc. Repealed: L. '25, Ex. Sess., p. 17, § 1.

CHAPTER 9

ATTORNEY GENERAL AND PROSECUTING ATTYS.

Duties of attorney general: See "State Officers," § 11030 et seq., infra.
Duties of prosecutors: See "Counties," § 4127 et seq., infra.

§ 112.* Powers and duties of attorney general. [Repealed b L. '29, p. 179, § 9, and re-enacted, p. 178, § 3.] The attorney gener shall have the power and it shall be his duty:—

o appear for and represent the state before the supreme court ases in which the state is interested;

o institute and prosecute all actions and proceedings for, or e use of the state which may be necessary in the execution duties of any state officer;

o defend all actions and proceedings against any state officer official capacity, in any of the courts of this state or the t States;

o consult with and advise the several prosecuting attorneys tters relating to the duties of their office, and when, in his ent, the interests of the state require, he shall attend the of any person accused of a crime, and assist in the prosecution. 29, p. 178, § 3; L. '91, p. 95, § 2; 2 H. C., § 84.]

alance of Act of 1929: See §§ 11030 et seq., infra.

in 3 Wash. 66, 27 Pac. 1067; h. 454, 58 Pac. 584, 47 L.R.A. 8 Wash. 497, 68 Pac. 946; 5 332 31 Pac. 876; 18 Wash. 480, 1071; 48 Wash. 158, 92 Pac. L.R.A.(N.S.) 525; 95 Wash. 3 Pac. 737; 140 Wash. 439, 440, c. 996.

rs and duties in general: See ton's Digest, Atty.-Gen., § 3; v. Reed, 3 Wash. 57, 27 Pac. State ex rel. Attorney General v. Gas etc. Co., 28 Wash. 488, 68 6, 70 Pac. 114; Ritchie v. State, h. 653, 85 Pac. 417.

re and functions of office: See ton's Digest, Dist. & Pros. § 1; Spokane County v. Allen, h. 229, 37 Pac. 428, 43 Am. St. 30.

attorney general is the proper to institute proceedings to com- e state board of equalization to m the duties enjoined by the f the legislators: State ex rel. Dunbar v. State Board of Equalization, 140 Wash. 433, 249 Pac. 996.

Subdivision 3 of this section does not relieve him of the duty to institute proceedings against state officers recreant to their trusts, to compel them to perform their duties: State ex rel. Dunbar v. State Board of Equalization, 140 Wash. 433, 249 Pac. 996.

For text treatment of "Attorney General," see 2 R. C. L. 913.

Dismissal of criminal proceedings on motion of. 66 A.L.R. 1378.

Quo warranto to determine right of corporation to practise law. 73 A.L.R. 1336.

Right of attorney general to intervene in divorce suit. 22 A.L.R. 1112.

Suit by attorney general to enforce or administer charitable trust. 62 A.L.R. 882.

Waiver by attorney general of state's immunity from suit. 42 A.L.R. 1484.

13. Prosecuting attorneys defined. Prosecuting attorneys ttorneys authorized by law to appear for and represent the and the counties thereof in actions and proceedings before ourts and judicial officers. [L. '91, p. 95, § 3; 2 H. C., § 85.]

d in 18 Wash. 224, 51 Pac. 369; sh. 61, 56 Pac. 843; 28 Wash. 3 Pac. 946.

For text treatment of "Prosecuting Attorneys," see 22 R. C. L. 86.

RCW Vol. 1

Chesham S Brandsley

REVISED CODE
OF
WASHINGTON

VOLUME 1

TITLES 1 TO 45

As Prepared by
STATE CODE COMMITTEE

AN ACT revising, consolidating and codifying all the laws of the State of Washington of a general and permanent nature and to set them forth under title, chapter, and section headings and numbers and enacting the whole as the "Revised Code of Washington," and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. The ninety-one titles with the chapters, sections, and numbering system hereinafter set forth are hereby enacted and designated as the "Revised Code of Washington." This code is intended to embrace in a revised, consolidated, and codified form and arrangement all the laws of the state of a general and permanent nature.

SEC. 2. The contents of this code shall establish prima facie the laws of this state of a general and permanent nature in effect on January 1, 1949, but nothing herein shall be construed as changing the meaning of any such laws. In case of any omissions, or any inconsistency between any of the provisions of this code and the laws existing immediately preceding this enactment, the previously existing laws shall control.

SEC. 3. All laws of a general and permanent nature enacted after January 1, 1949 shall, from time to time, be incorporated into and become a part of this code.

SEC. 4. Until such time as this code is published and made available the several codes existing immediately prior to this enactment may be officially cited.

SEC. 5. This code may be cited by the abbreviation " R.C.W."

SEC. 6. The Secretary of State shall cause to be printed for temporary use and as a part of the published session laws only the first seven sections of this act omitting the printing of the code proper.

SEC. 7. This act is necessary for the immediate preservation of the public peace, health and safety and for the immediate support of the state government and its existing public institutions and shall take effect immediately.

the sum of five thousand dollars, with sureties to be approved by the gover-
or, conditioned for the faithful performance of his duties and the paying over
all moneys, as provided by law.

43.07.02 If the governor deems any bond filed by the attorney general insuf-
icient, he may require an additional bond for any amount not exceeding five thou-
nd dollars.
If any attorney general fails to give such additional bond as required by the
vernor within twenty days after notice in writing of such requirement, his of-
ice may be declared vacant by the governor and filled as provided by law.

43.07.03 The attorney general shall:
(1) Appear for and represent the state before the courts in all cases in
hich the state is interested;
(2) Institute and prosecute all actions and proceedings for, or for the use
the state, which may be necessary in the execution of the duties of any state
fficer;
(3) Defend all actions and proceedings against any state officer in his offi-
al capacity, in any of the courts of this state or the United States;
(4) Consult with and advise the several prosecuting attorneys in matters re-
ting to the duties of their office, and when the interests of the state require,
shall attend the trial of any person accused of a crime, and assist in the pro-
ecution;
(5) Consult with and advise the governor, members of the legislature and other
tate officers, and when requested, give written opinions upon all constitution-
l or legal questions relating to the duties of such officers;
(6) Prepare proper drafts of contracts and other instruments relating to sub-
ects in which the state is interested;
(7) Give written opinions, when requested by either branch of the legislature,
r any committee thereof, upon constitutional or legal questions;
(8) Enforce the proper application of funds appropriated for the public in-
titutions of the state, and prosecute corporations for failure or refusal to
ake the reports required by law;
(9) Keep in proper books a record of all cases prosecuted or defended by him,
n behalf of the state or its officers, and of all proceedings had in relation
hereto, and deliver the same to his successor in office;
(10) Keep books in which he shall record all the official opinions given by
im during his term of office, and deliver the same to his successor in office;
(11) Pay into the state treasury all moneys received by him for the use of
the state.

43.07.04 The attorney general shall also represent the state and all of-
ficials, departments, boards, commissions and agencies of the state in the courts,
nd before all administrative tribunals or bodies of any nature, in all legal
or quasi legal matters, hearings, or proceedings, and advise all officials, de-
partments, boards, commissions, or agencies of the state in all matters involving
legal or quasi legal questions, except those declared by law to be the duty of
the prosecuting attorney of any county.

43.07.05 The attorney general may execute, on behalf of the state, any appeal
or other bond required to be given by the state in any judicial proceeding to which
it is a party in any court, and procure sureties thereon.

43.07.06 The attorney general may appoint necessary assistants, who shall
hold office at his pleasure, and who shall have the power to perform any act which

Laws of 1965

If any audit discloses malfeasance, misfeasance, or nonfea... in office on the part of any public officer or employee, ... thirty days from the receipt of his copy of the report, the ... general shall institute and prosecute in the proper county, ... priate legal action to carry into effect the findings of such ... audit. It shall be unlawful for any state department or the ... sible head thereof, to make a settlement or compromise of any ... arising out of such malfeasance, misfeasance, or nonfeasance ... any action commenced therefor, or for any court to enter ... any compromise or settlement of such action without the ... approval and consent of the attorney general and the state ...

43.09.340 Audit of books of state auditor. The governor ... from time to time, provide for a post-audit of the books, ... and records of the state auditor, and the funds under his ... to be made either by independent qualified public accountants ... the director of budget, as he may determine. The expense of ... ing such audit shall be paid from appropriations made ... from the general fund.

43.09.350 Record of state property. The state auditor shall ... stall and maintain in his office on forms to be furnished by ... director of budget, and in accordance with classifications ... by that officer, a controlling ledger in which shall be entered ... valuations of all property, real, personal, and mixed, owned ... state, and keep such ledger continually posted as capital ... are made by the various officers, institutions, and departments ... the state government, and once each year enter therein and ... such depreciation as may be required by uniform system of ... to be prescribed by the director of budget.

Chapter 43.10

ATTORNEY GENERAL

43.10.010 Qualifications—Oath—Bond. No person shall be ... ble to be attorney general unless he is a qualified practitioner ... the supreme court of this state.

Before entering upon the duties of his office, any person ... or appointed attorney general shall take, subscribe, and file ... oath of office as required by law, and execute and file with ... secretary of state, a bond to the state, in the sum of five ... dollars, with sureties to be approved by the governor, conditioned ... for the faithful performance of his duties and the paying over ... all moneys, as provided by law.

43.10.020 Additional bond—Penalty for failure to furnish. ... the governor deems any bond filed by the attorney general ...

... he may require an additional bond for any amount not ... five thousand dollars.

... attorney general fails to give such additional bond as ... by the governor within twenty days after notice in writing ... such requirement, his office may be declared vacant by the ... and filled as provided by law.

... **General powers and duties.** The attorney general shall:

(1) Appear for and represent the state before the supreme court ... case in which the state is interested;

(2) Institute and prosecute all actions and proceedings for, or ... use of the state, which may be necessary in the execution ... duties of any state officer;

(3) Defend all actions and proceedings against any state officer ... official capacity, in any of the courts of this state or the United ...

(4) Consult with and advise the several prosecuting attorneys ... matters relating to the duties of their office, and when the interest ... the state require, he shall attend the trial of any person ... for a crime, and assist in the prosecution;

(5) Consult with and advise the governor, members of the legislature ... and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties ... such officers;

(6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;

(7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions;

(8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for any neglect or refusal to make the reports required by law;

(9) Keep in proper books a record of all cases prosecuted or defended by him on behalf of the state or its officers, and of all proceedings had in relation thereto, and deliver the same to his successor in office;

(10) Keep books in which he shall record all the official opinions given by him during his term of office, and deliver the same to his successor in office;

(11) Pay into the state treasury all moneys received by him for or on the state.

... **Representation of boards, commissions and agencies.** ... general shall also represent the state and all officials, ... boards, commissions and agencies of the state in the ... before all administrative tribunals or bodies of any ... all legal or quasi legal matters, hearings, or proceedings,

and advise all officials, departments, boards, commissions, or a... cies of the state in all matters involving legal or quasi legal ... tions, except those declared by law to be the duty of the prose... attorney of any county.

43.10.050 Authority to execute appeal and other bond. ... attorney general may execute, on behalf of the state, any ... or other bond required to be given by the state in any judicial ... ceeding to which it is a party in any court, and procure ... thereon.

43.10.060 Appointment and authority of assistants. The ... general may appoint necessary assistants, who shall hold ... his pleasure, and who shall have the power to perform ... which the attorney general is authorized by law to perform.

43.10.065 Employment of attorneys and employees to ... state's legal business. The attorney general may employ ... charge attorneys and employees to transact for the state, its ... ments, officials, boards, commissions, and agencies, all busine... a legal or quasi legal nature, except those declared by law ... the duty of the judge of any court, or the prosecuting attorne... any county.

43.10.067 Employment of attorneys by others restricted. ... officer, director, administrative agency, board, or commissi... the state, other than the attorney general, shall employ, ap... or retain in employment any attorney for any administrative ... department, commission, agency, or tribunal or any other ... act as attorney in any legal or quasi legal capacity in the ex... of any of the powers or performance of any of the duties ... by law to be performed by the attorney general, except wh... is provided by law to be the duty of the judge of any court ... prosecuting attorney of any county to employ or appoint ... persons: *Provided*, That RCW 43.10.040, and RCW 43.10.065 ... 43.10.080 shall not apply to the administration of the judicial ... cil, the state law library, the law school of the state univer... the administration of the state bar act by the Washington ... Bar Association.

The authority granted by chapter 1.08 RCW, RCW 44.24.030 ... RCW 44.28.140 shall not be affected hereby.

43.10.070 Compensation of assistants, attorneys and em... The attorney general shall fix the compensation of all ... attorneys, and employees, and in the event they are assigned ... any department, board, or commission, such department, ... commission shall pay the compensation as fixed by the ...

... however in excess of the amount made available to ... department by law for legal services.

... Employment of experts, technicians. The attorney ... may employ such skilled experts, scientists, technicians, or ... specially qualified persons as he deems necessary to aid him in ... preparation or trial of actions or proceedings.

... Criminal investigations—Supervision. Upon the writ... request of the governor the attorney general shall investigate ... ons of the criminal laws within this state.

... such investigation, the attorney general believes that ... criminal laws are improperly enforced in any county, and that ... prosecuting attorney of the county has failed or neglected to ... te and prosecute violations of such criminal laws, either gen... or with regard to a specific offense or class of offenses, the ... general shall direct the prosecuting attorney to take such ... in connection with any prosecution as the attorney general ... deems to be necessary and proper.

... prosecuting attorney, after the receipt of such instructions ... the attorney general, fails or neglects to comply therewith ... a reasonable time, the attorney general may initiate and ... such criminal actions as he shall determine. In connec... therewith, the attorney general shall have the same powers as ... otherwise be vested in the prosecuting attorney.

... the time the attorney general has initiated or taken over ... prosecution, the prosecuting attorney shall not have ... authority to take any legal steps relating to such prose... except as authorized or directed by the attorney general.

... Biennial report. The attorney general shall prepare ... to the governor and the legislature, at or before the con... each biennial session, a concise statement of all matters ... his official duties, making such suggestions for lessen... public expenses and promoting frugality in the public offices ... seems expedient and proper.

... Other powers and duties. The attorney general shall ... power and it shall be his duty to perform any other duties ... may from time to time be required of him by law.

Chapter 43.12

COMMISSIONER OF PUBLIC LANDS

... Powers and duties—Generally. The commissioner of ... shall exercise such powers and perform such duties ... scribed by law.

Explanatory note.

43.09.110 Source—[1890 p 639 § 15; RRS § 11010. Prior: 1888 p 7[illegible]
Recodified as 43.08.064 as warrant issuing duties of ... state treasurer. See notes to 43.08.064.

43.09.120 Source—[1890 p 639 § 16; RRS § 11011. Prior: 1888 p 7[illegible]
Recodified as 43.08.066 as warrant issuing duties of ... state treasurer. See notes to 43.08.066.

43.09.130 Source—[1890 p 640 § 17; RRS § 11012. Prior: 1888 p 7[illegible]
Recodified as 43.08.068 as warrant issuing duties of ... state treasurer. See notes to 43.08.068.

43.09.140 Source—[1890 p 640 § 18; RRS § 11013. Prior: Code 1[illegible] 1854 p 411 § 9.]
Repealed and not reenacted as "settlement of any ... has application to a pre-audit function that became ... responsibility under 43.88.160(2) of the budget and ... act, and the "drawing of any warrant" in this ... devolved upon the state treasurer.

43.09.150 Source—[1890 p 640 § 19; RRS § 11014. Prior: Code 1[illegible] 1854 p 411 § 10.] Repealed and not reenacted ... 43.09.140.

43.09.160 Source—[1890 p 638 § 12; RRS § 11007. Prior: Code 1[illegible] 1854 p 411 § 8.]

43.09.170 Source—[1890 p 641 § 23; RRS § 11017. Prior: Code 1[illegible]

43.09.180 Source—[1890 p 641 § 24; RRS § 11018. Prior: Code 1[illegible]

43.09.190 Source—[(i) 1921 c 7 § 49; RRS § 10807. (ii) 1921 c 7 § 10810. (iii) 1921 c 7 § 55; RRS § 10813. (iv) 1927 c 2[illegible] c 18 § 11; RRS § 11101.]
Section prefaced by subchapter heading "Municipal corporations."

43.09.200 Source—[1909 c 76 § 2; RRS § 9952.]

43.09.210 Source—[1909 c 76 § 3; RRS § 9953.]

43.09.220 Source—[1909 c 76 § 4; RRS § 9954.]

43.09.230 Source—[1909 c 76 § 5; RRS § 9955.]

43.09.240 Source—[1963 c 209 § 2; 1911 c 30 § 1; 1909 c 76 § 6; RRS Prior: 1890 p 638 § 11; Code 1881 § 2577; 1854 p 411 § 6.]

43.09.250 Source—[1963 c 209 § 3; 1919 c 119 § 1; 1911 c 30 § 1; 1909 § 7; RRS § 9957.]

43.09.260 Source—[1909 c 76 § 8; RRS § 9958.]

43.09.270 Source—[1963 c 209 § 4; 1911 c 30 § 1; 1909 c 76 § 9; § 9960.]

43.09.280 Source—[1963 c 209 § 5; 1911 c 30 § 1; 1909 c 76 § 10; § 9961.]

43.09.282 Source—[1963 c 209 § 6.]

43.09.290 Source—[1941 c 196 § 1; Rem. Supp. 1941 § 11018-1.]
Section prefaced by subchapter heading "Duties as to Audits".
"this title" to "RCW 43.09.290 through 43.09.340".

43.09.300 Source—[1941 c 196 § 2; Rem. Supp. 1941 § 11018-2.]

43.09.310 Source—[1947 c 114 § 1; 1941 c 196 § 3; Rem. Supp. 1947 § 11018-3.]

43.09.320 Source—[1941 c 196 § 4; Rem. Supp. 1941 § 11018-4.]

43.09.330 Source—[1941 c 196 § 5; Rem. Supp. 1941 § 11018-5.]

43.09.340 Source—[1947 c 114 § 2; 1941 c 196 § 6; Rem. Supp. 1947 § 11018-6.]

43.09.350 Source—[1921 c 7 § 121; RRS § 10879.]

Chapter 43.10 Attorney General

43.10.010 Source—[1929 c 92 § 1, part; RRS § 11030, part. Prior: 1[illegible] 119 § 1; 1888 p 7 § 4.]

43.10.020 Source—[(i) 1929 c 92 § 1, part; RRS § 11030, part. (ii) 1929 c 92 § 2; RRS § 11031. Prior: 1921 c 119 § 1; 1888 p 7[illegible]

43.10.030 Source—[(i) 1929 c 92 § 3; RRS § 11[illegible] (ii) 1929 c 92 § 11032. Prior: 1891 c 55 § 2; 1888 p 8 § 6.]

Explanatory note.

... courts" to "supreme court" in subdivision (1) to restore ... common law language.
... Source—[1941 c 50 § 1, part; Rem. Supp. 1941 § 11034-3, part.]
... Source—[1929 c 92 § 6; RRS § 11034. Prior: 1905 c 99 § 1.]
... Source—[1929 c 92 § 7, part; RRS § 11034-1, part.]
... remainder of section recodified as 43.10.065 to restore session ... order.
... Source—[1941 c 50 § 1, part; Rem. Supp. 1941 § 11034-3, part.]
... formerly 43.10.060, part.
... Source—[(i) 1941 c 50 § 2; Rem. Supp. 1941 § 11034-4. (ii) 1941 c 50 § 4; Rem. Supp. 1941 § 11034-6.]
... formerly 43.01.080.
... paragraph added to update section to include agencies ... in existence at the time of the 1941 enactment and were ... authorized to employ lawyers by later law.
... section to "RCW 43.10.040, and 43.10.065 through 43.10.080".
... Source—[1941 c 50 § 1, part; Rem. Supp. 1941 § 11034-3, part.]
... Source—[1941 c 50 § 3; Rem. Supp. 1941 § 11034-5.]
... Source—[1937 c 88 § 1; RRS § 112-1.]
... Source—[1929 c 92 § 5; RRS § 11033. Prior: 1888 p 8 § 7.]
... Source—[1929 c 92 § 8; RRS § 11034-2.]
... formerly uncodified.

Chapter 43.12 Commissioner of Public Lands

... 43.12.020 through 43.12.150 have been omitted from the ... bill as the parent session law chapters for these sections ... and are codified in Titles 76 and 79. They will be recodified ... titles in their session law order and language upon publication ... supplement to RCW.
... Source—[1921 c 7 § 119; RRS § 10877.]
... 1941 Code Committee paraphrased the language of 1921 ... § 119 (a devolution section) to form 43.12.010. As the ... duties and functions of the commissioner of public ... are transferred to the department of natural resources ... 1957 c 38 § 13 (43.30.130), the language has been further ... generalized.

Chapter 43.17 Administrative Departments and Agencies—General Provisions

... Source—[1957 c 215 § 19; 1955 c 285 § 2; 1953 c 174 § 1. Prior: ... 1937 c 111 § 1; RRS § 10760-2, part. (ii) 1935 c 176 § 1; 1933 ... 1929 c 115 § 1; 1921 c 7 § 2; RRS § 10760. (iii) 1945 c ... part; Rem. Supp. 1945 § 10459-1, part. (iv) 1947 c 114 ... Rem. Supp. 1947 § 10786-10c.]
... Source—[1957 c 215 § 20; 1955 c 285 § 3; 1953 c 174 § 2. Prior: ... 1933 c 176 § 2; 1933 c 3 § 2; 1929 c 115 § 2; 1921 c 7 § 3; RRS ... 10760. (ii) 1937 c 111 § 1, part; RRS § 10760-2, part. (iii) 1945 c ... Rem. Supp. 1945 § 10459-1.]
... Source—[1921 c 7 § 18; RRS § 10776.]
... Source—[1921 c 7 § 118; RRS § 10876.]
... Source—[(i) 1921 c 7 § 20; RRS § 10778. (ii) 1921 c 7 § 134; ... § 10892.]
... director of public institutions" to "director of general administration" in last line.
... Source—[1921 c 7 § 19; RRS § 10777.]
... Source—[1929 c 115 § 3; 1921 c 7 § 4; RRS § 10762.]
... reference to "state law library committee" deleted as "state ... library committee" was repealed by 1959 c 188 § 6.
... Source—[1921 c 7 § 14; RRS § 10772.]
... Source—[1961 c 1 § 31 (Initiative Measure No. 207); 1929 c 68 ... 1921 c 7 § 15; RRS § 10773.]
... Source—[1921 c 7 § 16; RRS § 10774.]

Laws of 1971

of appeals, or judge of the superior court shall be charged for any search relative to matters pertaining to the duties of his office; nor may he be charged for a certified copy of any law or resolution passed by the legislature relative to his official duties, if such law has not been published as a state law.

All fees herein enumerated must be collected in advance.

Sec. 108. Section 43.08.020, chapter 8, Laws of 1965 and RCW 43.08.020 are each amended to read as follows:

The state treasurer shall reside and keep his office at the seat of government. Before entering upon his duties, he shall execute and deliver to the secretary of state a bond to the state in the sum of two hundred and fifty thousand dollars, to be approved by the secretary of state and one of the ((judges)) justices of the supreme court, conditioned to pay all moneys at such times as required by law, and for the faithful performance of all duties required of him by law. He shall take an oath of office, to be indorsed on his commission, and file a copy thereof, together with the bond, in the office of the secretary of state.

Sec. 109. Section 43.10.030, chapter 8, Laws of 1965 and RCW 43.10.030 are each amended to read as follows:

The attorney general shall:

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

(3) Defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;

(4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution;

(5) Consult with and advise the governor, members of the legislature and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers;

(6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;

(7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions;

(8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for

Amicus Brief

For Opinion See 98 S.Ct. 2733

Supreme Court of the United States.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Petitioner,
v.
Allan BAKKE, Respondent.
No. 76-811.
October Term, 1976.
June 7, 1977.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Brief of The State of Washington and The University of Washington As Amicus Curiae

Slade Gorton, Attorney General, State of Washington, By: James B. Wilson, Senior Assistant, Attorney General, State of Washington, Attorneys for Amicus Curiae, 112 Administration Building, University of Washington, Seattle, Washington.

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*ii TABLE OF AUTHORITIES

Cases

*1 INTEREST OF AMICUS CURIAE

The State of Washington, and its University of Washington, as amicus curiae seek to preserve the right of the University to serve the interests of all of its students in education for life and careers in a pluralistic, multi-racial society; to alleviate gross under-representation of minority races in professions for which the University provides education; to contribute to overcoming pervasive and invidious racial discrimination which, but for *2 preferential admissions programs, could make the University and its schools and departments segregated, tax-supported purveyors of education for the white majority race, in fact if not in law.

The State of Washington operates a system of higher education which includes two state universities, four statewide colleges and some 28 community colleges. Its largest university is the University of Washington, founded in 1861. The University is governed by a Board of Regents of seven members appointed by the Governor and confirmed by the state Senate. The University has more than 35,000 students, nearly a fourth of them enrolled in graduate or professional programs. Included are programs leading to professional degrees in law, medicine, dentistry, nursing, public affairs and social work, and graduate programs leading to the Ph.D. degree in most of the academic disciplines.

While the Board of Regents has the responsibility for admissions policies for its schools and departments, implementation of policy decisions is delegated to the deans and faculty of the various schools and colleges. The Board has directed the graduate and professional schools to "continue to recognize the need for greater representation of minority groups which are under-represented in their professions and/or academic ranks by developing, enunciating and implementing admissions policies which are consistent with the fulfilment of this need."[FN1]

FN1. Resolution of the Board of Regents

adopted June 13. 1975. appended as Appendix A to this amicus brief.

Each of the schools and colleges has its own admissions program. Each seeks to increase the numbers of qualified but under-represented*3 minorities among its students and in the profession it serves. None of the admissions programs sets aside a fixed number of seats for qualified minority applicants, as the University of California-Davis medical school does, but all of them consider favorably the minority race of applicants when determining who, among more qualified applicants than can be admitted, shall be admitted to the limited number of places available.

The University of Washington law school's program was the first such program challenged by a disappointed applicant who contended that he had been unconstitutionally discriminated against on the basis of his Caucasian race. Marco DeFunis, Jr. was that plaintiff. He persuaded the trial court that he had been discriminated against because the Constitution is "color blind," but the Supreme Court of the State of Washington reversed, stating in part:
"The state has an overriding interest in promoting integration in public education. In light of the serious under-representation of minority groups in the law schools, and considering that minority groups participate on an equal basis in tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling."[FN2]

FN2. *DeFunis v. Odegaard*, 82 Wn.2d at 33, 507 P.2d 1169 (1973).

The court further held that:
"The consideration of race in the law school's admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived."[FN3]

FN3. *Id.*, at 35.

*4 This Court granted certiorari and heard arguments, but decided that the case was moot because of the impending graduation of the plaintiff.[FN4] This Court vacated the judgment and remanded the case to the state court for such action "as it may deem appropriate." On remand, four of the Washington Justices would have reinstated the previous judgment of the State Supreme Court, three Justices declined to vote for reinstatement for varying reasons, none of which involved the merits of the previous decision of the court, and the two original dissenters remained in dissent.[FN5] The Supreme Court of the State of Washington has only recently reaffirmed its position taken in its original *DeFunis* decision in a unanimous decision in *State Employees v. Higher Education Personnel Board.*[FN6] Furthermore, it has cited its original *DeFunis* decision to support its conclusion that selective certification (preferential treatment for under-represented minorities in hiring) was necessary in order for the city of Seattle to comply with Title VII of the Civil Rights Act of 1964 and achieve "a fair approximation of minority representation in city employment."[FN7]

FN4. *Defunis v. Odegaard*, 416 U.S. 312.

FN5. *DeFunis v. Odegaard*, 84 Wn.2d 617, 529 P.2d 438 (1974).

FN6. 87 Wn.2d 823, 557 P.2d 302 (Dec. 16, 1976).

FN7. *Lindsay c. Seattle*, 86 Wn.2d 698, 548 P.2d 320 (April 1976).

The University of Washington's medical school also seeks to increase the number of certain minorities within its classes. They have chosen a different approach from the law school (and the University of California-Davis) because their admissions program generally has different goals. Seriously considered candidates for the limited places available are with certain exceptions limited to residents of Washington, Alaska, Montana and Idaho. Fixed numbers of seats are set aside for residents of Idaho, Alaska and Montana in accordance with *5 agreements between those states and the State of Washington in recognition of the inability of those states to provide medical education at their own universities because of limited resources. In order to assure that Blacks, Chicanos and American Indians are represented within the student body, their applications are seriously considered regardless of place of residence. In the view of the medical school admissions authorities this gives the school the best chance of having qualified minorities

within the class ranks and ultimately within the profession.

Other graduate and professional schools at the University of Washington approach the need in ways that best serve their overall educational needs and public purposes. But all of them approach it, and seek solutions within their admissions policies and in accordance with the regents' mandate.

Other state and local agencies of Washington have been vigorous in taking and supporting affirmative action to correct the effects of past racial discrimination in both employment and education. Most of these steps have not been taken because of court orders or compulsion by federal agencies in order to comply with federal civil rights laws or executive orders. They have been undertaken voluntarily by the agencies to meet the perceived and acknowledged need to correct the effects of slavery, segregation and discrimination against certain insular minorities within our society who by the very fact of past racially-biased, legally-sanctioned discrimination would still be denied equal opportunity to the educational and employment opportunities available in the state of Washington without such programs.

***6** If this Court were to affirm the decision of the Supreme Court of California in *Bakke v. Board of Regents,*[FN8] the programs that the Washington Supreme Court has found necessary to further the compelling interests of the state could be destroyed or crippled. For that reason, the State of Washington as amicus curiae urges the reversal of the decision of the Supreme Court of California.

FN8. 18 C 3rd 34. 132 CA R 680, 553 P.2d 1152 (1976).

QUESTION PRESENTED

While the question presented could be stated in the narrowest form, because of the broad sweep of the lower court's decision we believe, for the purposes of this brief, it must be stated as follows:

Does the United States Constitution preclude a state-supported university from considering minority race as an affirmative factor in its selection from among qualified applications for admission to a limited number of places within its student body?

A bewildering array of subsidiary questions might be stated, primarily because through history, prior to *DeFunis v. Odegaard,* from the creation of the Freedman's Bureau after the Civil War to the most recent implementation of affirmative action programs by the United States government, discrimination by any minority race against the majority race has been (as we think it largely remains) a non-problem. Some of those questions:

1. Does the same strict scrutiny standard apply when the purpose and effect of the allegedly discriminatory program are to benefit a minority, as in a program where the motive is neutral or malign?

2. If a compelling state interest is required, either absolute or on a relative scale, what weights are to be attached to factors such as the following:

a. Gross under-representation of minority race in the profession for which a school educates.

b. Former participation by the institution challenged in invidious discrimination for which the program is remedial and compensatory.

c. Absence of workable surrogate qualifications like "culturally deprived," "impoverished," "educationally handicapped," or "disadvantaged" to identify members of minority races without saying so, or in a "racially neutral" way.

d. The educational judgment of the faculties and administrators that the ends of education for all students are importantly served by a student body which is not monolithic in racial composition.

3. Must there be a showing of past discrimination by an agency in order to justify its ameliorative program?

4. Is a fixed number (or fixed percentage) of minority admittees in the University of California-Davis program, which differentiates it from the greater flexibility of other programs, a negative or a positive factor? In determining this, what weight should be given to invidiousness of discrimination, the compelling quality of the state interest, and scrutiny of race as a suspect category?

Wash. AGO 1953-55, No. 94

Office of the Attorney General
State of Washington

*1 AGO 53-55 No. 94
July 16, 1953

COUNTY TREASURER: DUTY TO DISTRAIN FOR PERSONAL PROPERTY TAX: AUTHORITY TO CHARGE REALTY FOR PERSONAL PROPERTY TAX: LIABILITY FOR PENALTY AND LOSS THROUGH NON-FEASANCE [[NONFEASANCE]]: REMEDIES FOR LOSS, PENALTY OR NON-FEASANCE [[NONFEASANCE]].

Treasurer:
1. Cannot refuse to distrain where facts require;
2. May charge realty in addition but not as alternative;
3. Is subject to penalty for non-feasance [[nonfeasance]]on statutory complaint;
4. Is personally liable in addition for loss to county through his non-feasance [[nonfeasance]]in civil action by prosecuting attorney;
5. May be compelled to perform duty by mandamus after demand and refusal, by prosecutor, citizen, or in extreme case by attorney general or governor.

Honorable Don G. Abel
Prosecuting Attorney
Becker Building
Aberdeen, Washington

Dear Sir:

You request our opinion whether
(1) the County Treasurer may refuse to distrain for personal property taxes and in lieu thereof charge the personal property tax against real property.
(2) If not, what civil liabilities has the County Treasurer incurred, particularly if loss to the County has occurred.
(3) What various remedies exist.

We conclude:
(1) The Treasurer has no such discretion; and
(2) depending upon the facts, the Treasurer is liable:
(a) for statutory nonfeasance penalties, and
(b) personally, for loss to the taxing bodies.
(3) Various remedies are:
(a) Statutory complaint for the penalty;
(b) a civil action by the prosecuting attorney for the loss (or in extreme instances the Attorney General); and
(c) a writ of mandamus
(i) by the prosecutor;
(ii) by a citizen after a demand and refusal of action by the prosecutor;
(iii) or in extreme instances by the Attorney General.

ANALYSIS

I. AUTHORITY TO DELAY DISTRAINT

(a) Necessity of Immediate Distraint:

Relative to the collection of personal property taxes RCW 84.56.070 (PTC sec. 252) provides:

"On the fifteenth day of February, succeeding the levy of taxes, the county treasurer shall proceed to collect all personal property taxes. He shall give notice by mail to all persons charged with personal property taxes, and if such taxes are not paid before they become delinquent, he shall forthwith proceed to collect them. If he is unable to collect them when due he shall prepare papers in distraint * * * and he shall without demand or notice distrain sufficient goods and chattels belonging to the person charged with such taxes to pay them, with interest at the rate provided by law from the date of delinquency, together with all accruing costs." (Emphasis supplied)

Such taxes become delinquent after
"the thirtieth day of April in each year." (RCW 84.56.020 - PTC sec. 248)

The duty can hardly be more specific to "forthwith" collect personal property taxes when due. "Forthwith" means "immediately" or "without delay," Webster's New Inter. Dict. (2d Ed., 1939) 994.

*2 We fully agree with and advise you that the Treasurer must forthwith distrain and sell sufficient personal property to pay the personalty taxes. He has no authority to grant an extension of time since the statute itself makes the tax due and payable on a date certain. However, the Treasurer does and must have a reasonable period of time for the carrying out of the distraint process particularly when a large number of delinquencies exist. A period of time necessary to a bona fide effort to distrain is of course valid.

(b) Charging the Realty:

Pursuant to RCW 84.60.040 (PTC sec. 293) the county treasurer, when "in his opinion" it is "necessary," may charge the personalty tax against real property. This is in no sense a substitute manner of collection. Rather, it provides additional protection to the county. It is not a method by which the Treasurer, in his discretion, may extend the time for payment of personal taxes. Thus, even though the realty of the taxpayer is charged with the tax, the Treasurer is still charged with the duty to "forthwith" collect and must in good faith attempt to distrain.

The reason is clear. If the collection of personalty taxes must pend the tax collection procedures applicable to real property, the tax, instead of being collected forthwith, will remain uncollected for up to five years, RCW 84.64.030 and 84.64.040.

Taxation is but the proportional contribution of citizens to the support of their government. If some pay less, others must pay more. Oklahoma Tax Commission v. United States, 319 U.S. 598, 609 (1943). The budgeted expenses and obligations of counties,

municipalities, and other taxing districts are based upon the tax revenues that will be collected. Even as you and I, they may not meet their obligations with uncollected moneys.

Such delayed collection as you mention not only can result in a loss but a basic unfairness. Taxpayers who have real property obtain an extension of time to pay their personal property tax not accorded to others. Such is contemplated neither by constitution nor statute.

CIVIL LIABILITY OF COUNTY TREASURER

(a) Statutory Nonfeasance Penalties:

RCW 84.56.410 (PTC sec. 286) provides

"Every * * * county treasurer who in any case refuses or knowingly neglects to perform any duty enjoined on him with respect to taxation, * * * shall, for every such neglect, * * * pay to the state not less than two hundred nor more than one thousand dollars, at the discretion of the court, * * *" (Emphasis supplied)

This penalty shall be recovered in any court of competent jurisdiction upon the complaint of

"any citizen who is a taxpayer;"

and

"the prosecuting attorney shall prosecute such suit to judgment and execution." (Emphasis supplied)

The penalties apply whether or not the county has actually suffered loss. Thus the penalties apply if personalty taxes are not forthwith collected, by distraint if necessary, unless legal justification for non-action [[nonaction]] exists.

*3 The presumption which we all do and should indulge, until the contrary is shown, is that public officials perform their duty, 3 Cooley, Taxation, (4th Ed. 1924) sec. 1011.

(b) Civil Liability:

If the county suffers a loss by virtue of the treasurer's failure to perform his duty, he is personally liable for such loss. Pierce County v. Newman, (treasurer) 26 Wn. (2d) 63 at 66, 173 P. (2d) 127 (1946):

"Upon the broad ground of public policy, persons charged with handling funds should be held to strict accountability for such funds irrespective of the cause of their loss, hence it was unimportant that respondent treasurer is not charged with personal conversion of the funds lost by the county."

The court further states:

"* * * If the county treasurer refuses or neglects to collect any taxes assessed upon personal property where same is collectible, or to file, as required by the statute, the delinquent list and affidavit with the auditor when unable to collect personalty taxes, the treasurer shall be liable for the whole amount of such taxes uncollected." (Emphasis supplied)

Such public officers, dealing as they do with public funds, are held to a high degree of accountability. See also Spokane County v. Prescott, (treasurer) 19 Wash. 418, 53 Pac. 661 (1898); Skagit County v. American Bonding Co., (auditor) 59 Wash. 1, 109 Pac. 197 (1910); Hillyard ex rel. Tanner v. Carabin, (city treasurer, engineer and clerk) 96 Wash. 366, 165 Pac. 381 (1917). The bond is only collateral security to the personal liability of the Treasurer.

On similar tax problems see Pacific National Bank v. Bremerton Bridge Co., 2 Wn. (2d) 52 at 60-61, 97 P. (2d) 162 (1939); Monroe Logging Co. v. Department of Labor and Industries, 21 Wn. (2d) 800 at 803, 153 P. (2d) 511 (1944); and In re Elvigen's Estate, 191 Wash. 614 at 622, 71 P. (2d) 672 (1937).

REMEDIES

Upon the complaint of any taxpayer, the prosecuting attorney should investigate. If the complaint is accurate, he "shall" prosecute the suit to judgment and execution. RCW 84.56.410 (PTC § 286). Upon demand and refusal of the prosecutor to act, a proper suit may lie to require him to bring the action. State ex rel. Evans v. B. O. F., en banc, 141 Wash. Dec. 120 [[41 Wn.2d 133]] (Sept. 2, 1952). Such an action by a private citizen is but the general duty of his citizenship --in no sense can he be considered an intermeddler. The presumption of proper performance of duty applies also to the prosecuting attorney.

If, in an extreme case, the Attorney General learns of a failure of duty not only on the part of the Treasurer but of the prosecuting attorney, we cannot conceive it other than less than our duty, if this office did not institute proper steps.

The Attorney General's
"paramount duty is made the protection of the interest of the people of the state" State ex rel. Dunbar v. State Board of Equalization, 140 Wash. 433 at 440. 249 Pac. 996 (1926).

*4 See also State ex rel. Clithero v. Showalter, 159 Wash. 519 at 521- 522, 293 Pac. 1000 (1930); Sasse v. King County, 196 Wash. 242 at 250, 82 P. (2d) 536 (1938); State v. Gattavara, 182 Wash. 325 at 329, 47 P. (2d) 18 (1935) and Reiter v. Wallgren, 28 Wn. (2d) 872, 184 P. (2d) 571 (1947).

There may even be situations arising where the Governor may act. **State ex rel. Hartley v. Clausen, 146 Wash. 588, 264 Pac. 403 (1928).**

CONCLUSION

(1) The county treasurer may not substitute a charge against the realty for his duty to collect personal property taxes immediately by distraint if necessary; (2) In his discretion, where necessary in order to secure payment of the tax, he should charge the realty. However, this is an additional, not a substitute protection to the county; (3) If the facts of a particular situation disclose that he has failed to do his duty, he is liable to the penalty provided by RCW 84.56.410, whether or not loss occurs to the county; (4) If the county does sustain loss, he is also personally liable for the amount of the loss. His bond is but collateral security to his own personal liability; (5) The first and primary obligation to insure proper performance of the Treasurer's duty is imposed upon the Prosecuting Attorney; and (6) In the event of his failure, others may either bring the action themselves or force him to do so.

The people whom we all serve have a right to good government. That right is never without a remedy.

Very truly yours,

Don Eastvold

Attorney General

Jennings P. Felix

Assistant Attorney General

Wash. AGO 1953-55 NO. 94, 1953 WL 45096 (Wash.A.G.)

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